BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EDWIN CAMACHO	)	
Claimant	)	
VS.	)	
	)	
JOSE GUERRA and SUNFLOWER STATE EXTERIORS, LLC	)	
Respondents	)	Docket No. 1,058,758
AND	)	
	)	
INSURANCE COMPANY UNKNOWN and AMERICAN INTERSTATE INSURANCE COMPANY	)	
Insurance Carriers	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

STATEMENT OF THE CASE

Respondent Sunflower State Exteriors, LLC, and its insurance carrier, American Interstate Insurance Company, appealed the September 13, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. Paul V. Dugan, Jr., of Wichita, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent Sunflower State Exteriors, LLC, and its insurance carrier, American Interstate Insurance Company (Sunflower). John C. Nodgaard of Wichita, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 1, 2012, preliminary hearing and exhibits thereto; the transcript of the April 18, 2012, deposition of claimant; the transcript of the January 17, 2012, deposition of Adan Guerra-Laguna and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant alleged he sustained two work-related injuries while working for respondent and filed applications for hearing in Docket Nos. 1,058,758 and 1,059,451. ALJ Barnes issued separate orders for each docket number. No party appealed the ALJ's preliminary Order in Docket No. 1,059,451. In Docket No. 1,058,758, claimant alleged that on November 5, 2011, he sustained an injury from a fall off a roof while at work. The Workers Compensation Fund was impleaded in both claims. ALJ Barnes found claimant was an employee of respondent Jose Guerra (Guerra), who was a subcontractor for respondent Sunflower State Exteriors, LLC (Sunflower). She then found Sunflower was the statutory employer of claimant. ALJ Barnes determined claimant gave timely notice of the accident, and impliedly found that claimant sustained a personal injury by accident arising out of and in the course of his employment with respondent. She also found it was more likely than not that the prevailing factor for claimant's symptoms and need for medical care was his November 5, 2011, work accident.

ALJ Barnes ordered temporary total disability (TTD) benefits commencing November 5, 2011, until claimant was released to substantial and gainful employment. She also ordered medical treatment at Via Christi Clinic and that all outstanding and related medical expenses be paid. Sunflower and its insurance carrier appealed.[1]

Sunflower asserted: (1) it was not claimant's statutory employer; (2) claimant did not give timely notice; (3) claimant failed to prove he sustained a personal injury by accident; and (4) claimant failed to prove his accident arose out of his employment with respondent as claimant did not prove his accident was the prevailing factor causing his injury and current need for medical treatment. The Fund adopted Sunflower's arguments, except it took no position on whether Sunflower was a statutory employer. Claimant requests the Board affirm the ALJ's findings.

The issues are:

1. Was Sunflower a statutory employer of claimant?

2. Did claimant provide timely notice of his accident to Guerra?

3. Did claimant sustain a personal injury by accident on November 5, 2011?

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[1] Sunflower filed an Application for Review with Docket No. 1,058,758 in its caption. The Application for Review indicated the Order it was appealing was attached thereto. Attached was the September 13, 2012, Order issued by ALJ Barnes in Docket No. 1,059,451. The Board assumes that Sunflower and its insurance carrier are appealing ALJ Barnes' September 13, 2012, Order in Docket No. 1,058,758 and inadvertently attached the Order in Docket No. 1,059,451 to the Application for Review, because in Docket No. 1,059,451 no benefits were awarded claimant.

4. If so, did claimant's personal injury by accident arise out of and in the course of his employment with respondent? Specifically, was claimant's accident the prevailing factor causing his injury, medical condition and current need for medical treatment?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant testified that he was employed as a roofer by Jose Guerra, who in turn worked for Sunflower. Claimant does not speak English and required an interpreter at his deposition and at the preliminary hearing. His job duties were anything associated with roofing, including tearing off roofs, installing new roofs, cleaning up, and lifting rolls of roofing paper and bundles of shingles. The bundles of shingles weighed 30 to 40 pounds and he would sometimes have to carry them up a ladder onto a roof.

Claimant testified that when he worked for Guerra, there would always be Sunflower signs in the yards of the homes being roofed. He did not recall ever working on a house where there was not a Sunflower sign in the yard. On November 5, 2011, there was a Sunflower sign at the job site where claimant alleges he was injured. Claimant observed trucks with Sunflower written on them arrive at the job sites. Sunflower workers would inspect the work that was being done. Claimant was paid $100.00 per day and would receive a $100.00 bonus when a job roofing a church was completed.

Each day claimant worked, he would go to Jose Guerra's home and Jose would then take claimant to the job site. When asked how Guerra received money to pay claimant, claimant testified Sunflower would pay Guerra using checks. According to claimant, Jose Guerra never mentioned working for any companies other than Sunflower. Claimant admits never seeing a contract, tax receipt, 1099 form or check stub showing Sunflower paid Guerra for roofing jobs that claimant worked on. He testified that on several occasions he was with Jose Guerra when Jose would pick up paperwork at the home of the owner or a supervisor of Sunflower. Claimant also overheard Guerra say he had to stop by and pick up a check.

Claimant testified that on November 5, 2011, he was on a roof, taking the leftover bundles of shingles and throwing them onto a trailer below. As he was throwing a bundle of shingles, he spotted Jose Guerra's son in the trailer. Claimant tried to stop throwing the bundle for fear of hitting Jose Guerra's son, and instead fell off the roof into the trailer along with the bundle. The fall injured claimant's left foot. Jose Guerra was also on the roof and got down and took claimant out of the trailer. Jose Guerra then rubbed some oil on claimant's injured left foot and put claimant in a truck. Claimant was told to wait in the truck until the pain was gone. After waiting five to seven minutes because of the pain, claimant asked to be taken home or something be done. Jose Guerra then took claimant to a masseuse and left him there. The masseuse rubbed claimant's injured foot.

Claimant's wife had to pick him up after the massage. Claimant never returned to work after the accident.

Some time later, claimant called Jose Guerra and asked for medical treatment. Claimant was not asked when that telephone conversation took place. According to claimant, Jose Guerra said to go to a hospital and tell the hospital the injury occurred when claimant fell at home. Jose Guerra told claimant to change his name at the hospital. Claimant went to Via Christi, where he gave his real name. His left foot, which was broken, was placed in a cast.

Claimant testified that when Jose Guerra was not present on a job, his brother Adan Guerra-Laguna was in charge. When Jose Guerra was not at the job site, Adan would sometimes be given papers by Sunflower. Claimant testified that he was told by Jose Guerra the checks were made out to Adan and the documents were in the name of Adan Guerra-Laguna, but the checks were for Guerra. Claimant indicated he was never paid by Adan, only by Guerra.

On January 17, 2012, Sunflower deposed Adan Guerra-Laguna, brother of Jose Guerra. He is an illegal alien, does not speak English and required an interpreter. He testified that Sunflower gave Guerra houses to work on and that he, Jose and claimant were workers for Sunflower. Sunflower would pay Jose Guerra, who would in turn pay Adan and claimant. When a roof needed roofing, Brad at Sunflower would call Guerra. Adan testified Guerra would then contact workers to assist him in roofing the house, and Adan and claimant were two of those workers. Guerra had the necessary equipment to roof the houses, including shovels, ladders, hammers and roofing guns. Sunflower would bring the shingles to the job site. When Adan worked for Guerra, two or three roofs a week would be completed. After a roof was completed, Sunflower would pay Guerra. Adan testified that Guerra did not have workers compensation insurance. Adan testified Jose Guerra moved back to Mexico four months earlier to take care of sick parents.

At his deposition, Adan testified that at times he and claimant would work for other jobs. That was because Guerra would not always have enough work to keep them employed full time. However, at claimant's evidentiary deposition, claimant testified that he had worked exclusively for Guerra the last two years. Claimant testified he worked five days a week for Guerra and was the person Guerra always took to work.

At Adan's deposition, a certificate of liability insurance was introduced which indicated Adan had workers compensation insurance from May 14, 2010, to May 14, 2011. Adan testified that he had never applied for workers compensation insurance and did not know how it came to be that his name was on the certificate. Nor was he previously aware of the certificate.

Adan testified that no one saw claimant fall from the roof and he had no marks on his body. Nor did he observe claimant on the roof. No one believed claimant was injured.

However, Adan admitted claimant was limping. Adan indicated claimant had been instructed by Guerra to clean up trash on the ground.

Via Christi's medical records indicated claimant was treated on November 14, 2011, for a fracture of the left calcaneus that extended into the posterior talocalcaneal joint space. The notes from that visit indicated claimant injured his left foot as the result of falling down stairs at home. Claimant was placed in a bulky Jones splint. Medical records placed into evidence at the preliminary hearing indicated claimant last saw a physician for the left ankle on January 30, 2012, when he saw Dr. George L. Lucas. Claimant testified that the last time he saw a doctor for the left ankle, that doctor told him to return in 60 days.

At the preliminary hearing, Sunflower introduced a Form 1099-MISC indicating that in 2011, Sunflower paid Adan Guerra-Laguna $326,320.00 in non-employee compensation.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[3]

K.S.A. 44-503(a), the statutory employer provision of the Act, states:

> Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For the purposes of

[2] K.S.A. 2011 Supp. 44-501b(c).

[3] K.S.A. 2011 Supp. 44-508(h).

> this subsection, a worker shall not include an individual who is a self-employed subcontractor.

In *Wheeler*,[4] the Kansas Court of Appeals set out when an employer is a statutory employer and stated:

> K.S.A. 44-503(a) "extends the application of the Kansas Workers Compensation Act to certain individuals or entities who are not the immediate employers of the injured workers, but rather are 'statutory employers.' [Citation omitted.]" *Robinett*, 270 Kan. at 98. Under this statute, "a principal will be liable to the employee of a subcontractor if the principal undertakes to do work which (1) is a part of the principal's trade or business, or (2) the principal has contracted to do for a third party." *Harper v. Broadway Mortuary*, 6 Kan. App. 2d 763, 764, 634 P.2d 1146 (1981). . . .

Claimant testified Sunflower placed signs in each and every yard of the homes Guerra's crew roofed and Sunflower employees inspected the work. Adan testified Jose would roof two or three houses every week for Sunflower, while claimant said it was four houses a week. In 2011, Sunflower issued a Form 1099-MISC to Adan Guerra-Laguna for more than $300,000.00. This Board Member finds there is sufficient evidence to establish Guerra, the subcontractor, performed work that was an integral part of Sunflower's business.

Sunflower asserted claimant failed to establish a contract for services existed between it, as principal employer, and Guerra, as subcontractor. In Kansas a contract for services does not have to be in writing.[5] Here, Jose Guerra provided a roofing crew for Sunflower. After each roofing job was completed, Sunflower would pay Guerra, who distributed the proceeds at his discretion among his workers. In its brief, Sunflower cites *Schafer*[6] and *Ellis*.[7] However, the facts in those cases are substantially different from the facts of this claim. In both of those cases it was very clear that the alleged statutory employer had no contract with the subcontractor. In both cases the court also found that the work performed by the alleged subcontractor was not an integral part of the alleged statutory employer's business. Simply put, claimant has met his burden of proving that Sunflower was a statutory employer pursuant to K.S.A. 44-503(a).

Sunflower next argues claimant did not provide timely notice. In its brief, Sunflower incorrectly asserts, "The New Law changes included deleting the ability of an injured

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[4] *Wheeler v. Rolling Door Co.*, 33 Kan. App. 2d 787, 109 P.3d 1255 (2005).

[5] *Bright v. Bragg*, 175 Kan. 404, 264 P.2d 494 (1953).

[6] *Schafer v. Kansas Soya Products Co.*, 187 Kan. 590, 358 P.2d 737 (1961).

[7] *Ellis v. Fairchild*, 221 Kan. 702, 562 P.2d 75 (1977).

worker to be excused from giving notice of the injury if 'the employer's duly authorized agent' had actual knowledge of the accident."[8] That assertion ignores K.S.A. 2011 Supp. 44-520(b). Claimant testified that he was seen falling off the roof by Jose, who rubbed oil on claimant's injured foot. Claimant then asked to be taken home or something done because of the pain caused by the injured foot. This Board Member finds Guerra had actual knowledge of the accident, which pursuant to K.S.A. 2011 Supp. 44-520(b), excused claimant from giving oral or written notice. In addition, it seems quite logical that claimant would have discussed the accident with Jose Guerra when he rubbed oil on claimant's injured foot, when claimant asked to be taken home or something done, or during the ride to the masseuse.

Sunflower next contends that its authorized agent did not have actual knowledge of the accident, only Guerra had actual knowledge. K.S.A. 2011 Supp. 44-520(b) states that the notice required by subsection (a) is waived if the employee proves the employer or employer's duly authorized agent had actual knowledge of the injury. Claimant's employer was Guerra. Jose Guerra was the person who assisted claimant on the date he was injured. Sunflower was claimant's statutory employer. Since Guerra had actual knowledge of claimant's injury, this Board Member finds notice is waived pursuant to K.S.A. 2011 Supp. 44-520(b).

Because no one saw claimant fall, it is alleged by Sunflower there was no accident. To support this argument, Sunflower points to the fact that when claimant sought medical treatment on November 14, 2011, he said he injured the foot in a fall at home. The ALJ was persuaded by the testimony of claimant that he injured his left foot when on November 5, 2011, he fell off the roof. This Board Member concurs.

Sunflower contends there is no medical evidence that claimant's fall off the roof was the prevailing factor causing claimant's injury and current need for medical treatment. K.S.A. 2011 Supp. 44-508(f) does not require medical evidence to make a finding that claimant's accident was the prevailing factor causing his injury and current need for medical treatment. K.S.A. 2011 Supp. 44-508(g) states in part, "In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties." Here, ALJ Barnes did that. Claimant testified his broken left foot resulted from his fall off the roof. This Board Member finds that claimant met his burden of proof on the issue of prevailing factor.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted

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[8] Sunflower's Brief at 8 (filed Sept. 28, 2012).

[9] K.S.A. 2011 Supp. 44-534a.

by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[10]

CONCLUSION

1. Sunflower was a statutory employer of claimant.

2. Claimant provided timely notice of the accident to Guerra and Guerra also had actual knowledge of the accident.

3. Claimant sustained a personal injury as the result of a work-related accident on November 5, 2011.

4. Claimant's accident was the prevailing factor causing his injury, medical condition and current need for medical treatment.

WHEREFORE, the undersigned Board Member affirms the September 13, 2012, Order entered by ALJ Barnes.

IT IS SO ORDERED.

Dated this ____ day of December, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Paul V. Dugan, Jr., Attorney for Claimant
nancy@duganduganlaw.com

Terry J. Torline, Attorney for Sunflower and American Interstate Insurance Company
tjtorline@martinpringle.com; dltweedy@martinpringle.com

John C. Nodgaard, Attorney for Fund
jnodgaard@arnmullins.com

Nelsonna Potts Barnes, Administrative Law Judge

[10] K.S.A. 2011 Supp. 44-555c(k).